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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JANE DOE,

Plaintiff and Respondent,

v.

ALMA DEL PUEBLO
OWNERS ASSOCIATION, et
al.,

Defendants and Appellants.

2d Civ. No. B301277
(Super. Ct. No. 18CV04974)
(Santa Barbara County)

The trial court denied a special motion to strike brought pursuant to Code of Civil Procedure¹ section 425.16 (anti-SLAPP [Strategic Lawsuit Against Public Participation] motion) as untimely. Under the unusual circumstances here, the court

¹ All statutory references are to the Code of Civil Procedure unless otherwise stated.

abused its discretion in not allowing a late filing. (§ 425.16, subd. (f).)

FACTS

Alma Del Pueblo is a mixed-use common-interest development with 37 residential condominium units and three commercial units. The project is governed by the Alma Del Pueblo Owners Association (Association). Jane Doe owns a residential unit in the project, and as such is a member of the Association.

Doe alleges that Margaret Cafarelli, through one or more of her entities, manages the Association and owns and operates the commercial units. Doe claims that Cafarelli has been siphoning money from the residential side of the Association to the commercial side, as well as other acts of mismanagement.

In July 2017, one of the commercial space tenants, Due Piccioni, LLC (Piccioni), a restaurant management company, applied to the California Department of Alcoholic Beverage Control (ABC) for a liquor license. Doe opposed the application, triggering an administrative hearing. Piccioni served a subpoena on the Association seeking copies of the Association's governing documents and all disclosures given to Doe relating to the purchase of her unit. The Association responded to the subpoena. The documents produced in response to the subpoena were never used outside the context of the administrative dispute. Thereafter, Doe withdrew her opposition to the license.

In August 2017, Doe submitted her name for the October 19, 2017 election of the Association's board of directors. Doe's attorney, James Scafide, wrote a letter to Cafarelli demanding the email addresses of the Association's members. Scafide

threatened litigation should the Association fail to comply. The Association refused to comply.

On October 6, 2017, the Association held a board meeting open to members only to approve rules for the election. Doe appeared with Scafide. Doe claimed she has a mental disability and needed Scafide to serve as an interpreter and facilitator. The board objected to Scafide's presence as violative of the rules of professional conduct. When Scafide refused to leave, the board called the police and adjourned the meeting. As an accommodation to Doe's disability, the Association told Doe she could have any aid she wanted except Scafide or a member of his law firm. Doe lost the election.

Doe filed complaints with the U.S. Department of Housing and Urban Development (HUD) and the California Department of Fair Employment and Housing (DFEH) alleging that the Association failed to provide reasonable accommodation for her disability. The Association notified its members of the complaint Doe filed with HUD.

Procedure

Doe filed her original complaint on October 10, 2018, naming the Association, the Association's manager, The Management Association, Inc., the Association's attorneys, the law firm Adams Stirling, and others as defendants.² Doe did not serve the original complaint. Instead, she filed and served the first amended complaint, again naming the Association and its attorneys as defendants. The first amended complaint, like the original complaint, contained 27 causes of action.

² The Association and The Management Association, Inc. are hereafter collectively referred to as "the Association."

The causes of action alleged against the Association and Adams Stirling were for intentional and negligent infliction of emotional distress, disclosing private facts and consumer information, and disability discrimination. The causes of action were related to the Association's response to Piccioni's subpoena; the letter to the Association's members disclosing that Doe had filed a complaint with HUD; calling the police to remove Scafide from the board meeting; and the Association's refusal to allow Scafide to assist Doe at the board meetings.

On February 28, 2019, Adams Stirling filed a timely special motion to strike Doe's first amended complaint pursuant to section 425.16. On March 8, 2019, the Association filed a motion to join Adams Stirling's section 425.16 motion.

At the hearing on the motion, the Association's counsel reminded the trial court that it moved to join in the motion. The court granted Adams Stirling's motion, but did not rule on the Association's joinder motion. Doe appealed the grant of the motion as to Adams Stirling, but abandoned the appeal.

Doe filed a second amended complaint on April 10, 2019, alleging causes of action against the Association similar to those alleged in the first amended complaint. On May 24, 2019, the Association demurred to the second amended complaint. On June 7, 2019, the Association filed the instant special motion to strike pursuant to section 425.16. The trial court consolidated the rulings on the demurrer and the special motion to strike.

The trial court denied the Association's special motion to strike as untimely. The court noted that the Association did not seek the Court's permission to make an untimely filing. The court stated that the Association is not using the special motion to strike for its intended purpose of bringing about a relatively

inexpensive resolution of lawsuits that threaten free speech. Instead, the Association is using the special motion for a strategic purpose.

The trial court sustained the Association's demurrer as to 13 of the causes of action with leave for Doe to file a third amended complaint.

DISCUSSION

Our Legislature enacted section 425.16 out of a concern that litigation was being used to chill the constitutional rights of free speech and to petition for the redress of grievances. (*Id.* at subd. (a).) To protect the constitutional rights of defendants who are the victims of such lawsuits, the Legislature created the special motion to strike so that the action may be terminated at an early stage. Subdivision (b)(1) of section 425.16 provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Subdivision (f) of section 425.16 provides for time limits for making the special motion. Subdivision (f) states in part: "The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper."

Our Supreme Court has recognized that a special motion may be abused by defendants seeking to delay meritorious litigation. Thus, the court interpreted subdivision (f) to permit the special motion against an amended complaint if it could not

have been brought earlier, but to prohibit belated motions that could have been brought earlier, subject to the trial court's discretion to permit belated motions. (*Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637, 645.) In other words, the 60 days begins to run from the service of the first version of the complaint that raises the offending cause or causes of action.

Here it is undisputed that Adams Stirling's special motion to strike in response to the first amended complaint, in which the Association moved to join, was timely. It is also undisputed that the causes of action alleged in the first amended complaint that were subject to the special motion are substantially the same as those alleged in the second amended complaint. It is further undisputed that the Association did not file its separate special motion within 60 days of the service of the first amended complaint. Finally, Doe does not dispute on appeal the merits of the Association's special motion, only its timing. The trial court's order denying the motion did not reach the merits.

Section 425.16, subdivision (f) gives the trial court broad discretion to consider a special motion filed after the 60-day limit. The most important consideration in exercising that discretion is whether the late filing advances the statute's purpose of examining the merits of the covered lawsuit in the early stages of the proceedings. (*San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 624.) Additionally, the court should consider whether there was an extreme delay in filing the motion and any prejudice to the plaintiff. (*Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal.App.4th 772, 775-776, 787.)

In denying the Association's special motion, the trial court found that the Association is not using the special motion for its intended purpose of bringing an early end to litigation; instead, the Association is using the motion for a strategic purpose. The court did not specify the strategic purpose.

Doe suggests the strategic purpose is to delay discovery. But that suggestion is belied by the Association's attempt to join Adams Stirling's timely motion. Nothing in the record suggests the Association's joinder motion was not made in good faith. In fact, the Association's counsel reminded the trial court of its joinder motion at the hearing on Adams Stirling's motion. The court's minute order granting Adams Stirling's motion contains an extensive analysis of the reasons for granting the motion, but it fails even to mention the Association's joinder motion, no less rule on it. There appears to be no reason why the court would not grant the Association's joinder motion, or for that matter, why the court would grant relief to Adams Stirling and not the Association. The allegations against them both were the same.

The Association's late special motion was the result of the trial court's failure to rule on the Association's timely motion. It was an abuse of discretion for the court to fail to rule on the Association's timely motion, and deny the Association's subsequent motion as untimely.

Doe argues that the Association should have moved for reconsideration or appealed the original order. But a motion for reconsideration must be based on new or different facts, circumstances, or law. (Code Civ. Proc., § 1008, subd. (a).) Doe cites no authority that the motion is appropriate where the court simply fails to rule. Nor is the trial court's failure to rule appealable. Only a final judgment or order is appealable. (Code

Civ. Proc., § 904.1, subd. (a)(1); *In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1216.)

Doe does not suggest it, but perhaps the Association could have made a post-hearing motion for a ruling in the trial court based on the court's inherent power to control the disposition of causes on its docket with economy of time and effort. (*OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111, 141.) Failing that, the Association could have petitioned this court for a writ of mandate directing the court to rule.

But the Association points out that Doe was promising a second amended complaint. At the hearing on Adams Stirling's special motion on April 2, 2019, Doe's counsel represented that she would be filing a second amended complaint by April 9, 2019. The Association argues it was reasonable to wait for the second amended complaint before renewing its motion. That was at least one reasonable strategy, given that the Association was left in limbo by the trial court's failure to rule. The second amended complaint may have eliminated the need for the motion.

Doe argues that the trial court's ruling is consistent with section 425.16's policy of providing an early resolution of the litigation. But the litigation is still in the pleading stage. The same order that denied the motion as untimely, granted Doe time to file a third amended complaint. Moreover, the Association tried for an earlier termination but the court failed to rule on its motion.

Doe claims she was prejudiced by the delay caused by the motion. She points out that filing the special motion delays discovery. (§ 425.16, subd. (g).) First, any delay is caused by filing the motion, not deciding it. Had the trial court exercised its discretion to decide the motion on its merits, it would have

created no greater delay than its decision to deny the motion as untimely.

Second, the stay on discovery is not absolute. A party on a showing of good cause may request an order that specified discovery be conducted. (§ 425.16, subd. (g).) Doe made no such motion.

Third, Doe appealed the grant of Adams Stirling's special motion before abandoning the appeal. She is now on her third amended complaint. Under the circumstances, Doe's claim of prejudice arising from the delay caused by the Association's special motion seems less than genuine.

Doe attempts to make much of the trial court's statement that the Association did not seek leave to file a late motion. But Doe cites no authority that any such leave was necessary.

In *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, *supra*, 4 Cal.5th at page 645, our Supreme Court stated, "In this case, as the trial court noted when it exercised its discretion to deny a late filing, much litigation, including discovery, had already been conducted for two years before the anti-SLAPP motion brought it to a halt. It is far too late for the anti-SLAPP statute to fulfill its purpose of resolving the case promptly and inexpensively." None of those factors are present here. It is not too late to resolve at least part of the case promptly and inexpensively.

Doe's reliance on *Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174 is misplaced. There the defendant brought its special motion on the eve of trial. The trial court denied the motion as untimely. In affirming, the Court of Appeal stated that a motion brought after the initial 60-day period will be untimely "in the absence of some event which has reopened

the 60-day period” (*Id.* at. p. 1189.) Doe argues there is no such event here. But section 425.16, subdivision (f) contains no such limitation. Instead, the court must exercise its discretion under all of the circumstances. Under the unusual, if not unique, circumstances here, the trial court abused its discretion.

DISPOSITION

We reverse and remand the case to the trial court to consider the merits of the motion. Costs on appeal are awarded to appellants.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Thomas P. Anderle, Judge

Superior Court County of Santa Barbara

Murphy, Pearson, Bradley & Feeney, Jeff C. Hsu and
Patrick A. Gillespie for Defendants and Appellants.

Scafide Law Firm, James Scafide and Tyler Sprague for
Plaintiff and Respondent.